

1 Michele Besso  
Northwest Justice Project  
2 501 Larson Bldg., 6 South 2<sup>nd</sup> Street  
Yakima, WA 98901  
3 (509) 574-4234

4 Weeun Wang  
Farmworker Justice  
5 1126 16<sup>th</sup> Street NW, Suite 270  
Washington, DC 20036

6 Attorneys for Plaintiffs

7  
8 UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

9 ELVIS RUIZ, FRANCISCO JAVIER  
10 CASTRO and EDUARDO MARTINEZ,

11 Plaintiffs,

12 vs.

13 MAX FERNANDEZ and ANN  
FERNANDEZ, a marital community;  
14 and WESTERN RANGE  
ASSOCIATION, a foreign nonprofit  
15 organization,

16 Defendants.

No. CV-11-3088-RMP

PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF MOTION TO  
COMPEL DISCOVERY  
RESPONSES

17  
18 **I. INTRODUCTION**

19 Plaintiffs move the Court pursuant to Federal Rule of Civil Procedure 37(a)  
20 for an order compelling Defendant Max Fernandez to produce documents  
21 requested in Plaintiffs' First Set of Interrogatories and Requests for Production,

1 which were served on defendant back in July, 2012. Defendant's responses to  
2 several discovery responses are incomplete, such that they constitute a failure to  
3 respond pursuant to Rule 37(a) (4).

## 4 **II. PROCEDURAL AND FACTUAL BACKGROUND**

5 Plaintiffs served defendant Fernandez with the First Set of Interrogatories  
6 and Request for Production on July 10, 2012. Decl. of Michele Besso ¶2.  
7 Defendant responded to these discovery requests on September 18, 2012, after  
8 plaintiffs filed a motion to compel. *Id.* at ¶4. However, despite the fact that  
9 more than 30 days had passed, defendant objected to several requests, and  
10 provided incomplete responses to several more. Mr. Fernandez testified at his  
11 deposition on October 29, 2012 about the existence of additional responsive  
12 documents. *Id.* at ¶ 6. Counsel for plaintiffs faxed a letter to defendant's  
13 counsel on November 2, 2012 requesting the responsive documents and  
14 offering to confer about the matter. *Id.* at ¶ 9. Counsel for plaintiffs followed  
15 up with telephone calls on Friday November 9, 2012 and Wednesday,  
16 November 14, 2012. Counsel for defendant Fernandez has not responded. *Id.* at  
17 ¶12.

18 In the meantime, on November 5, 2012, plaintiffs served a subpoena for  
19 documents on defendant's accountant, requesting many of the same documents.  
20 *Id.* at ¶ 7. On November 13, the accountant produced several documents in  
21

1 response to the subpoena summarizing Fernandez Ranch business expenses.

2 However, there were no receipts, bills, invoices, cancelled checks or other  
3 supporting documentation, although these had been requested. *Id.* at ¶ 8.

4 Plaintiffs have not been able to confirm with defendant Fernandez as to whether  
5 he has other responsive documents that have not been produced. Finally,  
6 defendant Fernandez has failed to comply with the court's order of September  
7 21, 2012, ordering payment of \$500 in attorney fees. *Id.* at ¶13.

## 8 **II. ARGUMENT**

### 9 **A. Plaintiffs are Entitled to an Order Compelling Discovery Based on Max** 10 **Fernandez' Failure to Respond.**

11 If a party fails to respond to a request for production under Fed. R. Civ. P.  
12 34, the party requesting the discovery may apply for an order compelling  
13 discovery. Fed. R. Civ. P. 37(a) (3) (B).

14 The movant is required to make a good faith effort to confer with the party  
15 failing to make the discovery in an effort to secure the information without court  
16 action. Fed. R. Civ. P. 37(a)(2)(B) & (d). Plaintiffs have made several attempts to  
17 confer with Defendant Fernandez' attorney regarding discovery. Decl. of Michele  
18 Besso ¶10-12. Defendant Fernandez has still not provided complete responses to  
19 the First Set of Interrogatories and Request for Production which was served on  
20 July 10, 2012. Defendant's failure to produce discovery on a timely matter has  
21 interfered with plaintiffs' ability to prepare their case. Plaintiffs need a full set of

1 discovery responses to prepare summary judgment motions before the dispositive  
2 motion cut-off of December 2, 2012.

3 **B. Defendant Has Failed to Provide Complete Responses to Interrogatory**  
4 **11 and Requests for Production No. 1 and No. 19**

5 Plaintiffs requested documents recording Max Fernandez's food purchases  
6 during the period plaintiffs worked on his ranch in two separate requests. The  
7 responses were incomplete.

8 Plaintiffs' Request for Production ("RFP") No. 19 requested that defendant:

9 Produce all documents relating to any practices or procedures relating  
10 to the provision of food to the Plaintiffs, including records as to  
quantities, purchases, costs, and dates of delivery.

11 In response, defendant Fernandez produced nine handwritten food lists, all  
12 but one of which were undated, plus a one-page summary of annual food expenses.

13 Interrogatory No. 11 requested that defendant:

14 describe in detail your practices and procedures relating to your  
15 provision of food to the Plaintiffs during the years that you employed  
16 them, including the quantity and kind of food provided, how and  
17 where the food was purchased, prepared and delivered to the  
Plaintiffs, what records you kept relating to such food purchases and  
deliveries, how often you purchased food, and any changes in any  
such practices and procedures over time.

18 RFP No. 1 requested production of all documents identified in response to  
19 this Interrogatory. Defendant responded to the request for production, "None."

20 However, in his deposition, Max Fernandez testified that he kept receipts for  
21 the food purchases that he made for his workers and that at the end of each year he

1 sent these receipts to his accountant for tax purposes. Besso Decl. ¶ 6 (e).

2 Documents in the possession of Mr. Fernandez' accountant are in Mr. Fernandez'  
3 "custody or control" pursuant to Rule 34 and therefore must be produced.

4 **C. Defendant Fernandez' Objection to Producing Documents Requested in**  
5 **RFP No. 26 is Without Merit**

6 Plaintiffs' Request for Production No. 26 requested

7 All business, operating, and financial plans or statements regularly  
8 prepared by Max Fernandez on an annual, quarterly or monthly basis  
9 since January 1, 2007.

10 Defendant Fernandez failed to produce responsive documents. Instead he  
11 stated the objection that the request was "not calculated to lead to the discovery of  
12 relevant information." Defendant's objection fails both because he failed to object  
13 within the time required and thus waived any objections, and because the  
14 information requested is reasonably calculated to led to probative evidence.

15 "It is well established that a failure to object to discovery requests within the  
16 time required constitutes a waiver of any objection." *Richmark Corp. v. Timber*  
17 *Falling Consultants*, 959 F. 2d 1468, 1473 (9<sup>th</sup> Cir. 1992). Plaintiffs served their  
18 First Set of Interrogatories and Requests for Production of Documents on  
19 defendant Fernandez on July 10, 2012. Besso Decl. ¶ 2. Defendant Fernandez  
20 first responded to plaintiffs' discovery requests on September 18, 2012, well after  
21 the 30 day response period expired, and only after plaintiffs filed a motion to

1 compel. *Id.* at ¶ 4. Therefore, defendant Fernandez waived any objections to  
2 Plaintiffs' discovery requests.

3 Furthermore, the testimony given by Mr. Fernandez at his deposition on  
4 October 29, 2012 made clear that the requested business, operating, and financial  
5 plans and statements are probative. Plaintiffs have alleged that they spent  
6 substantial periods of their employment at Fernandez Ranch engaged in general  
7 ranch work such as constructing and repairing fences, cutting grass, maintaining  
8 farm machinery, building farm structures, and chopping firewood , all or which  
9 were tasks outside of the scope of their contracted job as range shearers.  
10 Complaint, ¶ 42-43. Mr. Fernandez has denied that plaintiffs performed work  
11 other than shepherding at his ranch. Mr. Fernandez testified at his deposition that  
12 the work that plaintiffs claim to have performed was actually performed by several  
13 individuals with whom he contracted during the period in question. Besso Decl. ¶  
14 6 (a)-(c).

15 It was Mr. Fernandez' testimony that he did not keep records of hours  
16 worked by these individuals, did not report earnings paid to these individuals on  
17 1099 or W-2 Forms, and often paid in cash. *Id.* at ¶ 6 (a)-(d). However, he testified  
18 that he did keep records of farm expenses for tax purposes. *Id.* at ¶ 6 (a). Records  
19 of farm expenses for the years 2007 through 2010 should include documentation of  
20 expenditures spent on contract labor during this period. Such documentation  
21

1 would tend to make defendant's allegation that independent contractors (rather  
2 than plaintiffs) performed a great deal of the ranch work on the Fernandez Ranch  
3 more or less probable than the allegation would without such records, which is the  
4 test for relevant evidence. These records, and all other responsive business,  
5 operating, and financial plans and statements that Mr. Fernandez has withheld are  
6 discoverable and must be produced.

7 **D. Defendant Fernandez Only Partially Answered Interrogatory No. 12**

8 Plaintiffs' Interrogatory No. 12 asked Mr. Fernandez:

9 For each year from 2007 through 2011, identify and describe each  
10 mobile housing unit (including make, model, year of manufacture,  
11 year of purchase or acquisition by or for Max Fernandez, and price at  
12 which it was purchased or otherwise acquired by or for Max  
13 Fernandez) occupied by any of the Plaintiffs while herding sheep for  
14 Max Fernandez, and for each such mobile housing unit and for each  
15 Plaintiff who occupied it, state the dates during which the Plaintiff  
16 occupied the unit, and for each of the dates, the locations (including  
17 geographic coordinates, at which the Plaintiff occupied the unit.)

18 Mr. Fernandez identified only one mobile housing unit in response, "an  
19 Airstream purchased in July 2006 for \$1200; inside of Airstream refurbished in the  
20 winter that year making it easier to keep clean, i.e. removed carpet and installed  
21 linoleum." At his deposition, Mr. Fernandez testified that he had four to five  
trailers during this time period. Besso Decl. ¶ 6 (f). Plaintiffs request that the  
Court compel defendant to identify and describe the other mobile housing units

1 occupied by any of the plaintiffs while herding sheep for Mr. Fernandez, as  
2 requested by Interrogatory 12.

3 **E. Mr. Fernandez' Failure to Fully Respond to RFP No. 33 Is Without**  
4 **Legal Basis**

5 Plaintiffs requested production of "all service or maintenance records related  
6 to any vehicles and machinery identified in Interrogatory No. 7. Mr. Fernandez  
7 responded that "none kept." In his deposition, however, Mr. Fernandez testified  
8 that he does keep records of his expenses on maintenance of farm vehicles and  
9 equipment. Besso Decl. ¶ 6 (a). For the same reasons stated above in regards to  
10 RFP No. 26, any records responsive to this request which are in Mr. Fernandez'  
11 possession, custody or control must be produced.

12 **III: CONCLUSION**

13 Based on the forgoing authority and the supporting declarations of counsel,  
14 this Court should grant Plaintiffs' Motion to Compel Discovery and enter an order  
15 compelling Defendant Max Fernandez to provide the documents requested in  
16 Plaintiffs' Requests Nos. 1, 19, 26, 33, and Interrogatory No. 12 by Wednesday,  
17 November 28, 2012. In addition, Defendant Fernandez and his attorney should be  
18 ordered to pay Plaintiffs' reasonable costs and fees for bringing this motion.

19 Dated this 16th day of November, 2012.



1 NORTHWEST JUSTICE PROJECT

2  
3 /s/ Michele Besso  
4 Michele Besso, WSBA #17423

5 FARMWORKER JUSTICE

6 By: /s/ Weeun Wang  
7 Weeun Wang

8 Attorneys for Plaintiffs  
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

John Barhoum: [jbarhoum@dunncarney.com](mailto:jbarhoum@dunncarney.com)

Timothy J. Bernasek: [tbernasek@dunncarney.com](mailto:tbernasek@dunncarney.com)

Gary Lofland: [glofland@glofland.net](mailto:glofland@glofland.net)

Weeun Wang: [wwang@farmworkerjustice.org](mailto:wwang@farmworkerjustice.org)

John Jay Carroll: [jcarroll@vhlegal.com](mailto:jcarroll@vhlegal.com)

DATED this 16<sup>th</sup> day of November, 2012.

/s/ Estella M. Del Villar  
Estella M. Del Villar, Legal Assistant for  
Michele Besso, WSBA #17423  
Attorney for Plaintiffs  
Northwest Justice Project  
510 Larson Bldg., 6 South 2<sup>nd</sup> St.  
Yakima, WA 98901  
(509) 574-4234  
Email: [micheleb@nwjustice.org](mailto:micheleb@nwjustice.org)

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